

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1079

ORIGINAL

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET NUMBER 77-1079

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

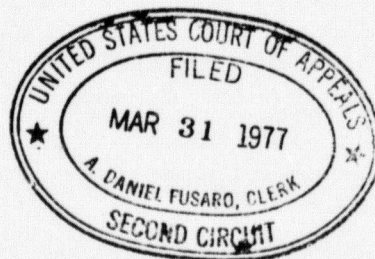
v.

OTTO SCHMANSKI and PETER
DI GIOVANNI,

Defendants-Appellants.

On appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLANT PETER DI GIOVANNI



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

v.

PETER DI GIOVANNI, ET AL

DEFENDANT-APPELLANT.
-----x

BRIEF FOR APPELLANT PETER DI GIOVANNI

STATEMENT OF THE ISSUES

1.

Whether the evidence was sufficient to sustain defendant-appellant Peter DiGiovanni's conviction of conspiracy and forcibly breaking into a post office with the intent to commit a larcency or other depredation.

2.

Whether the trial court's failure to give a Garguilo-type charge, that mere presence at the scene of a crime does not of itself establish aiding or abetting or membership in a conspiracy is reversible error, in the absence of a request by the defendant to so charge.

STATEMENT OF THE CASE

This is an appeal from the judgment of conviction entered in this action on February 4, 1977, against defendant-appellant Peter DiGiovanni. On November 22, 1976, DiGiovanni was tried with a co-defendant, Otto Schmanski, before the Hon. Jack B. Weinstein and a jury, in the United States District Court for the Eastern District of New York, on a two count indictment, No. 76 Cr. 530. Count one charged both defendants with forcibly breaking into the United States Post Office at Eltingville, 4455 Amboy Road, Staten Island, New York, on May 22, 1976, with intent to commit a larceny or other depredation, in violation of 18 U.S.C. §§ 2115 and 2.

Count two charged both defendants with conspiracy to commit the substantive offense, in violation of 18 U.S.C. § 371.

At the conclusion of a one day trial, the jury returned a verdict of guilty on each count against both defendants. On February 4, 1977, DiGiovanni was sentenced to concurrent terms of imprisonment of two years on each count and continued on bail pending appeal.

STATEMENT OF FACTS

On Saturday, May 22, 1976, the U.S. Post Office branch at 4455 Amboy Road, Eltingville, Staten Island, New York, was closed at 12 noon. The last postal employee to leave, Thomas Trabosci,

testified that when he left, the post office was in good order, the walls were not ripped and the safe had not been broken into (A-16-18)*.

At about 10:30 P.M., an alarm originating at the Eltingville station, was received by Sgt. Edward McDermott of the U.S. Postal Inspection Service, the security supervisor on duty, at the Brooklyn Postal Station. Sgt. McDermott called two men, got the keys to the Eltingville station and responded to the alarm. Upon arrival he observed that a partition wall had been pulled away, ripping some wires and causing the alarm which could not be heard inside the post office (A-22-24).

Robert Seton-Harris, a New York City police officer, testified that on May 22, 1976 between 10-10:30 P.M., while in a patrol car with Officer Leonard Ames, a radio call was received as a result of which they proceeded to the Eltingville post office. Upon arrival, Officer Ames went to the front of the post office and Officer Seton-Harris proceeded along the side of the building toward the side door (A-28-29). Seton-Harris testified initially, that while proceeding along the walkway he saw two figures emerge from the side door, jump over a fence and head toward a wooded area. At the time he made these observations he was approximately forty feet from the two figures. He ran to his right, toward the wooded area, caught the defendant Schmanski, placed him under arrest and removed a pair of work gloves from him (A-31-32). He walked across the field with Schmanski and met Officer Ames who had arrested

* numbers in parenthesis refer to pages in Appellant's Appendix.

DiGiovanni. They returned with their prisoners to the patrol car (A-33-34). Seton Harris inspected the postal station and found that the fence in the rear had been cut to allow somebody to get through and the side door had been jimmied. A piece of panel board had been broken away from the lower part of a wall, next to the door of a safe, inside the post office (A-35), where a canvas bag full of assorted tools was found. A large crow bar, a wire cutter, a three pound hammer, a drill, a hacksaw, a small pry bar, ten drill bits, five punches, two knives, and four cold chissels were recovered, vouchered and received in evidence at the trial.

Officer Seton-Harris testified that when he saw the two men emerge from the post office, there were no lights illuminating the area and he could not see their faces (A-40). He could not identify DiGiovanni as being one of the men that came out of the post office (A-42). He recalled seeing a third figure leave the post office through peripheral vision, but he never took his eyes off the two men he was chasing (A-41,49). As he apprehended Schmanski, the second man reached the woods and escaped (A-46). He never mentioned in prior discussions with postal inspector Cole nor the Assistant United States Attorney in charge of the case that he had observed a third person at the side door through peripheral vision, nor did he so testify in the Grand Jury. His first mention of it was in court on that day (A-58). He confirmed that he testified before the Grand Jury that he saw the side door spring open and three males emerge and leap over the fence (A-48).

Leonard Ames, a retired New York City police officer testified that on May 22, 1976, at about 10:30 P.M. while on duty in a patrol car with Officer Seton-Harris, a call was received on the police phone, as a result of which they responded to the Eltingville post office. After checking the front door, which he found secure, he proceeded around the side of the building toward Seton-Harris. As he approached, Seton-Harris ran off in the dark. When Ames was alongside the building, he observed a man wearing old clothes on the ground, in a prone position, his body coming halfway out of a hole in the fence (A-67-9,80). When he first observed the man he was about 15 to 20 feet from him. Proceeding with his gun out, he told the man later identified as Peter DiGiovanni, "Don't move or I'll shoot you". DiGiovanni said "Don't get nervous", and Ames replied, "I'll get nervous because I'm retiring next week" (A-68-9,86). After DiGiovanni and Schmanski were put in the patrol car, Ames and another officer found a pry bar and a set of bolt cutters near the hole in the fence where DiGiovanni was apprehended (A-71-72). An examination of the postal station revealed marks around the lock of the side door and numerous tools on the floor about three feet from a hole in a wall where a piece of sheetrock had been cut (A-73-75).

Ames never saw anyone come out of the post office or jump over the fence (A-81-82,88).

On cross examination, Ames testified that DiGiovanni was lying prone in the grass, outside the fence, next to the hole,

and that he didn't see him crawl through the hole (A-82-84).

Postal Inspector James Cole testified that his examination of the post office revealed that the wall next to the vault area had been stripped and the paneling pulled away (A-94). That five work type gloves had been recovered, a green pair, a brown pair, and an individual brown glove concerning which he was uncertain if it had been taken from DiGiovanni or if he had found it on a bench in a detention cell at the Police Station (A-100-101).

At the conclusion of the presentation of the Government's evidence motions to dismiss both counts of the indictment were denied (A-102-3). Both defendants rested without adducing any evidence and DiGiovanni's counsel informed the court that he had no requests to charge (A-104).

As far as it went, the charge on the law of conspiracy and aiding and abetting was correct. However, the jury was never told in plain words that mere presence at the scene of a crime even with knowledge that a crime is being committed does not of itself establish aiding or abetting or membership in a conspiracy (A-108-14).

After the guilty verdict, motions to set aside the verdict as against the weight of the evidence and as contrary to law and for a judgment of acquittal were denied (A-119).

ARGUMENT

POINT I

THE EVIDENCE WHICH ESTABLISHED NOTHING MORE THAN DIGIOVANNI'S PRESENCE AT THE SCENE OF A CRIME WAS INSUFFICIENT TO SUSTAIN HIS CONVICTION FOR ANY OF THE OFFENSES CHARGED.

The law is well settled in this circuit, as in others, that mere presence at the scene of a crime, even when coupled with knowledge that a crime is being committed, is insufficient to prove aiding and abetting or membership in a conspiracy, United States v. Johnson, 513 F.2d 819 (2d Cir. 1975); United States v. Terrell 474 F.2d 872 (2d Cir. 1973); United States v. Garguilo, 310 F.2d 249 (2d Cir. 1962); United States v. Barfield, 447 F.2d 85 (5th Cir. 1971); United States v. Barber, 429 F.2d 1394 (3d Cir. 1970).

In United States v. Johnson, supra, a narcotics prosecution, this court held that evidence which did not show that the defendant had any stake in importing drugs from Canada or that he had any connection with the acquisition, concealment, importation, use or sale of drugs, was insufficient to sustain a conviction of conspiracy and importation of drugs. The court so found notwithstanding defendant's presence in an automobile at a time when drugs were discovered concealed in the vehicle by United States Customs officials, his close association with the person who owned and operated the car and a false exculpatory statement made by the defendant shortly after his arrest.

This court said at 823-4:

"It is well established, however, that in order to be an aider and abettor the defendant must associate himself with the venture in some fashion, participate in it as something that he wishes to bring about, 'or seek by his action to make it succeed' The rule is similar with respect to establishing membership in a conspiracy ... mere presence at the scene of a crime, even when coupled with knowledge that at that moment a crime is being committed, is insufficient to prove aiding and abetting or membership in a conspiracy."

Similarly, in United States v. Barfield, supra, it was held that evidence that the defendant was seen in a tavern across the street from a post office playing pool and talking with a man who had been seen going in and out of the post office on the night a forcible attempt to break into the post office allegedly occurred and that the defendant was later found in a car driven by that same man and in which numerous heavy tools were discovered would not support an inference that the defendant aided and abetted the actual commission of the alleged crime.

The court said at 88:

"It is well established, however, that merely being found at or near the scene of the crime or in the company of a person engaged in crime is, without more, not sufficient evidence that one is an aider and abettor."

Here, the evidence establishes no more than that the defendant DiGiovanni was present at or near the scene of a crime and consequently it is insufficient, as a matter of law, to sustain his conviction. Nothing of significance beyond the fact of presence is to be found in the evidence. No one saw DiGiovanni come out of the post office. Neither his fingerprints nor any material from his clothing was found inside the post office or on burglars

tools or other items linked with the crime. Compare, Sykes v. United States, 373 F.2d 607 (5th Cir. 1966), cert. den. 87 S. Ct. 1172 (1967). There is not an iota of evidence that he served as a lookout during the commission of the crime, which would be a clear indication of his participation. Nor is there evidence of his flight from the scene with the actual perpetrators which has been said to justify the same inference. See, United States v. Barbe, supra, at 1397, N.4, and cases cited therein. Indeed, there is no evidence that he had ever met Schmanski before his arrest.

Retired Police Officer Ames testified initially that when he first observed DiGiovanni he was on the ground, in a prone position, with his body coming halfway out of a hole in a fence behind the post office (A-67-9,80). Later, on cross examination, he altered his testimony, stating that when he saw DiGiovanni he was lying prone in the grass, outside the fence, next to the hole and that he didn't see him crawling through the hole (A-82-84). Either version of the facts establishes nothing of significance beyond the defendant's mere presence at or near the scene of a crime and "is as hospitable to an inference consistent with the defendant's innocence as it is to the Government's theory of guilt." See, United States v. Johnson, supra, at 824. Certainly, Ames initial version, is no more inculpatory then the evidence in United States v. Johnson, supra, or United States v. Barfield, supra, which was found insufficient to sustain a conviction.

In any event, no genuine credibility question is presented in a criminal case, by conflicting testimony from the same prosecution witness and not from two or more witnesses. In such a case, the conflict must be resolved by the court, in the defendant's favor either by disregarding the irreconcilable aspect of the testimony in its entirety or by crediting the version most favorable to the defendant. See, Blackburn v. Alabama, 361 U.S. 199, 209 (1960); United States v. Birrell, 447 F.2d 1168, 1173 (2d Cir. 1971); United States v. Barber, supra. See also, United States v. Taylor, 464 F.2d 240 (2d Cir. 1972); United States v. Brooks, 349 F.Supp. 168 (S.D. N.Y. 1972); People v. Stewart, 40 N.Y.2d 692, 389 N.Y.S.2d 804, 809 (1976); People v. Reed, 40 N.Y.2d 204, 386 N.Y.S.2d 371 (1976); People v. Ledwon, 153 N.Y. 10, 46 N.E. 1046 (1897); People v. Owens, 148 N.Y. 648, 43 N.E. 71 (1896).

Here, therefore, there is no basis for finding that DiGiovanni's body was halfway through the hole in the fence when he was first seen by Officer Ames. No more may be found than that when first seen by Officer Ames, DiGiovanni was lying on the ground, in a prone position, next to the hole in the fence and that he was not seen crawling through the hole. The evidence establishes nothing more than DiGiovanni's presence at or near the scene of the crime and, clearly is insufficient to support his conviction on either count.

POINT II

THE TRIAL COURT'S FAILURE TO CHARGE THAT MERE PRESENCE AT THE SCENE OF A CRIME DOES NOT OF ITSELF ESTABLISH AIDING OR ABETTING OR MEMBERSHIP IN A CONSPIRACY WAS REVERSIBLE ERROR.

The trial court charged the jury on the elements of conspiracy and aiding and abetting (A-108-14). As far as it went, the charge was entirely correct. However, the jury was never told in plain words that mere presence at the scene of a crime even with knowledge that a crime is being committed, does not of itself establish aiding or abetting or membership in a conspiracy.

Recently, in United States v. McDougal-Pena, 545 F.2d 833 (2d Cir. 1976), this court affirmed a conviction over a claim of error based on a failure to instruct the jury that mere presence at a crime even with knowledge would not of itself establish participation. The defendant did not request such a charge and under the circumstances this court did not consider the point further.

It noted however, at 836:

"We do stress, as we recently did in United States v. Erb, 543 F.2d 438, 447 (2d Cir. 1976), that a Garguilo-type charge regarding presence and guilty knowledge should be given, when appropriate, in the future whether requested or not."

In United States v. Erb, 543 F.2d 438 (2d Cir. 1976), this court said at 447:

"However, when the issue of aiding and abetting is submitted to the jury, we see no persuasive reason why a judge should not include the thought that mere knowledge that the crime is being committed is not sufficient to convict a defendant. We trust that district court judges

in this circuit will do so in the future, although, as this opinion indicates, failure to have done so in the past will not necessarily result in reversal."

See also, United States v. Terrell, 474 F.2d 872, 876 N.2 (2d Cir. 1973).

Erb, was decided on October 1, 1976, after the trial in MacDougal-Pena, which occurred in May, 1976; see, United States v. MacDougal-Pena, supra, at 835, and thus its admonition was not applicable to that case. DiGiovanni was tried on November 22, 1976, almost two months after the decision in Erb and thus the failure to give a Garguilo-type charge as to him regarding presence and guilty knowledge was reversible error even in the absence of a request to so charge.

This is particularly so in a case such as this where a serious question of the sufficiency of the evidence is raised and at the very least, the issue is an exceedingly close one. Indeed, in United States v. Garguilo, 310 F.2d 249 (2d Cir. 1962), a seminal decision in the area, this court held that a charge on aiding and abetting, though entirely correct in the abstract, was reversibly erroneous as to a defendant charged as an aider and abettor, where the evidence against him, if it passed the test of sufficiency applicable in a criminal case, did so "only by a hair's breadth", and the jury was not told in plain words that mere presence at the scene of a crime and guilty knowledge on the part of that defendant was not enough for conviction.

Here too, the jury was not told that the mere presence of DiGiovanni at or near the scene of a crime, without more, was insufficient to establish his participation in the crime. As in

Garguilo, the closeness of the issue imposed an obligation on the trial judge to so instruct the jury, even in the absence of a request to charge. Consequently, the trial court's failure to so charge was reversible error.

POINT III

PURSUANT TO F.R. APP. P. 28(i) DIGIOVANNI INCORPORATES BY REFERENCE ALL POINTS AND ARGUMENTS RAISED BY THE APPELLANT SCHMANSKI INsofar AS THEY ARE APPLICABLE TO HIM.

CONCLUSION

THE EVIDENCE WHICH ESTABLISHED NOTHING MORE THAN DIGIOVANNI'S PRESENCE AT OR NEAR THE SCENE OF A CRIME WAS INSUFFICIENT TO SUSTAIN HIS CONVICTION FOR ANY OF THE OFFENSES CHARGED. THUS, HIS CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED. AT THE VERY LEAST, THE TRIAL COURT'S FAILURE TO GIVE A GARGUILO-TYPE CHARGE REQUIRES REVERSAL.

Respectfully submitted,

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